mains silent when another purports to make a contract as his authorized agent is liable on such contract. This seems logical. Theoretically, acceptance is but the expression of a condition of the mind and may be evidenced by passive as well as by active conduct of the offeree. If, under the circumstances, in the ordinary experience of life, the honest and practical understanding of the silence would be that it meant acceptance, there is a contract. If the transaction would be held a contract at the suit of the offeree, the result should be the same if the offeror is the plaintiff. There is no necessity for loose theories of estoppel and moral duty. Judged by the usual objective standard of our law, silence as acceptance presents no difficulty other than that of mode of proof.

WHEN SHOULD *CY-PRÈS* APPLICATION OF CHARITIES BE ALLOWED?[1] —When conditions have so materially changed that it is no longer possible or expedient to devote property to the particular charity for which it was given, the question arises as to the disposal to be made of the property. If a testator, dying before the adoption of the Thirteenth Amendment, had ordered that the income of a trust he created should be used in freeing American slaves, should his heirs have taken the funds on the abolition of American slavery,[2] or should the property have been devoted to some other charity? We must also consider whether any circumstance, other than impossibility of following the donor's directions, is sufficient to justify a deviation from the original use.

A trust for charitable purposes when once created, like any private trust, is clearly irrevocable.[3] Nor does it appear that the creators of trusts or their representatives have any right, by agreement with the trustees or otherwise, to compel a different use of the trust funds or property,[4] the right to alter differing only in degree from the right to revoke. Neither can those persons who happen to be beneficiaries at a particular time give a valid assent to an alteration of the charitable use, since those beneficiaries, from the very nature of a charitable trust, do not represent all those who are likely to be benefited in the future.[5] Further, the attorney-general, though he be the general representative of the beneficiaries,[6] does not seem to be the proper person to change the

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[1] The doctrine of *cy-près* discussed here is to be distinguished from the doctrine of *cy-près* with respect to the construction of limitations of future estates. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 643 *et seq.*

[2] Jackson *v.* Phillips, 14 All. (Mass.) 539 (1867).

[3] St. Joseph's Orphan Society *v.* Wolpert, 80 Ky. 86, 89 (1882); Mott *v.* Morris, 249 Mo. 137, 155 S. W. 434 (1913); Maxcy *v.* City of Oshkosh, 144 Wis. 238, 256, 128 N. W. 899, 907 (1910).

[4] Christ Church *v.* Trustees, 67 Conn. 554, 35 Atl. 552 (1896); St. Paul's Church *v.* Attorney-General, 164 Mass. 188, 41 N. E. 231 (1895). The courts readily infer an intent that the trust should be perpetual. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 60. See also College of St. Mary Magdalen *v.* Attorney-General, 6 H. L. 189, 205 (1857); Perin *v.* Carey, 24 How. (U. S.) 465, 507 (1860); Odell *v.* Odell, 10 All. (Mass.) 1, 6 (1865).

[5] The beneficiaries of a charity trust, as a whole, are indefinite. See *Re* Lavelle, [1914] 1 I. R. 194; Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371 (1900); *Re* MacDowell's Will, 217 N. Y. 454, 112 N. E. 177 (1916).

[6] See *Re* Foraker, [1912] 2 Ch. 488, 492.

uses of a charitable trust.[7] As to the trustees, mere administrators of the trust, it is clear that they are given no such right.[8]

Whatever power the British parliament may have to change the uses of a charitable trust,[9] the Dartmouth College case [10] seems to have settled in the United States that any attempt by the legislature solely on its own volition to change the use of a charitable trust would constitute a violation of the contract clause of the Constitution.[11] In that case the trustees were averse to the plan proposed by the legislature, but the same result has been reached in some cases even when the trustees assented to the legislative amendments.[12] Other cases, however, have upheld the right of the legislature, when fortified by the sanction of the trustees, to effect a change.[13] It is submitted that these latter decisions represent the better view, for all parties whose interests may be affected by the change are represented when the trustees and the legislature act together, since the legislature represents the whole people, which includes the beneficiaries and the donors, and the trustees act for themselves. Granting, however, that the legislature should have this power, is it wise to confine this power solely to its will? Legislative action is always delayed and cumbersome, particularly when an exigency demands quick action. Again, the power to change is not granted as a matter of right, but rests purely within the discretion of the law-making body.

We may then inquire whether there rests any basis upon which the

[7] No decisions have been found that the attorney-general may waive the rights of all subsequent beneficiaries. He is a proper party to file an information for the enforcement of a charity. See Ironmongers Co. *v.* Attorney-General, 2 Beav. 313, 328–332 (1840); Attorney-General *v.* Magdalen College, 18 Beav. 223, 241 (1854). And he is a necessary party to all suits in equity to carry out the provisions of a charitable trust. Strickland *v.* Weldon, 28 Ch. Div. 426 (1883); Harvard College *v.* Society for Promoting Theological Education, 3 Gray (Mass.), 280 (1855).

[8] Langdon *v.* Plymouth Congregational Society, 12 Conn. 137 (1837); Winthrop *v.* Attorney-General, 128 Mass. 258 (1880); Lakatong Lodge *v.* Franklin Board of Education, 84 N. J. Eq. 112, 116, 92 Atl. 870, 871 (1915). See also *Re* Campden Charities, 18 Ch. Div. 310, 329–330 (1881).

[9] For a discussion on the powers of the Charity Commissioners and Board of Education (educational charities) see: *Re* Campden Charities, *supra*, 331; The King *v.* Board of Education, [1910] 2 K. B. 165, 179.

[10] 4 Wheat. (U. S.) 518 (1819).

[11] The court in that case was of the opinion that the New Hampshire legislature by the proposed changes would violate the contract comprised in the grant of the charter by the British Crown to the trustees, and also, it would seem, the contract between the donors of the property and the trustees. But the case has been of great influence in discussions of the question of the right of the legislature to change charitable trusts. See the cases cited in notes 13 and 14, *infra*.

[12] State *ex rel.* Pittman *v.* Adams, 44 Mo. 570 (1869). See also Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92 (1890); Crawford *v.* Nies, 220 Mass. 61, 65, 107 N. E. 382, 383 (1914). In State *ex rel.* Pittman *v.* Adams, *supra*, 582, the court said: "One may do what he will with his own, and if his benevolent instincts lead him to expend his fortune for the good of others, public policy certainly requires that he should be made to feel quite secure in his benevolence. This security he can never feel, if his gift shall be subject to the changing opinions of its future administrators with the frail check only of legislative consent."

[13] Visitors and Governors of St. John's College *v.* Comptroller and Treasurer, 23 Md. 629 (1865). And see *Re* St. Mary's Church, 7 S. & R. (Pa.) 517 (1821). For the opinions of a committee, relative to a project to apply to the Rhode Island legislature for amendments of the charter of Brown University, see FINAL REPORT OF THE COMMITTEE TO CONSIDER POSSIBLE CHANGES IN THE CHARTER OF BROWN UNIVERSITY, June 16, 1910, pages 36 *et seq.*

judicial power may exercise the right in question. Donors may entirely fail to specify the particular charitable use, and in such case the English chancellor appoints a particular charity to take the gift.[14] Or if a trustee to whose discretion the expenditure for charity has been entrusted dies without indicating the particular use, the chancellor in England and some American courts frame schemes whereby the property may be devoted to charity.[15] In England the chancellor, in the exercise of royal prerogative as representative of the sovereign, under the sign-manual power, did take it upon himself to devote to a valid charity property given for one against public policy. For example, in an early case where a Jew made a testamentary gift for the advancement of the Jewish faith, which was at that time considered against public policy, the chancellor ordered the gift to be devoted to a charity under the patronage of the Church of England.[16] Although the result reached might be far from what a reasonable person could infer to have been desired by the donor, the chancellor felt justified in changing the use, for a gift to charity, it was held, tended to reconcile the soul of the donor with God, and if the gift could not take effect one way, for the sake of the donor's soul it should be made effective in another.[17] No American court has gone so far in attempts to reconcile sinners with Heaven.[18]

In the cases given above the chancellor and the courts of equity are not exercising a judicial function. While this power of devoting property to charity merely because the donor has indicated a general desire for such an application is often called the *cy-près* power, it must be distinguished from the true rule of *cy-près*, which is a rule of construction.[19] In construing the instrument whereby the gift is made, the courts often

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[14] Mills *v.* Farmer, 1 Meriv. 55 (1815); Anon., Freem. Ch. 261 (1702); Attorney-General *v.* Syderfen, 1 Vern. 224 (1683). And see *Re* Pyne, [1903] 1 Ch. 83.

[15] Attorney-General *v.* Berryman, Dick. 168 (1755); Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839 (1889). *Contra*, Fontain *v.* Ravenel, 17 How. (U. S.) 359 (1854). And no scheme will be framed if discretion of the particular trustee was to have been an essential element of the charity. Rogers *v.* Rea, 98 Ohio 315, 120 N. E. 828 (1918).

[16] Da Costa *v.* De Pas, 1 Amb. 228 (1754); Cary *v.* Abbot, 7 Ves. 490 (1802). *Cf.* West *v.* Shuttleworth, 2 Mylne & K. 684 (1835). See also 8 HARV. L. REV. 69.

[17] Attorney-General *v.* Downing, Wilm. 1, 32 (1767).

[18] Robbins *v.* Hoover, 50 Colo. 610, 115 Pac. 526 (1911); Erskine *v.* Whitehead, 84 Ind. 357, 364 (1882); Bridges *v.* Pleasants, 39 N. C. 26 (1845). But the legislature may exercise the sign-manual prerogative or authorize the courts to do so. Mormon Church *v.* United States, 136 U. S. 1 (1890).

[19] In Ironmongers Co. *v.* Attorney-General, *supra*, 924, the court said: "We may look at his disposition in the will to see what his charitable inclinations were, and, having ascertained them, then we must provide something corresponding without opinion of these charitable inclinations. You cannot talk of his intention with respect to something he never contemplated. The true mode is to consider what he did and from what he did to collect what were his intentions." In Jackson *v.* Phillips, 14 All. (Mass.) 539, 580, 591 (1867), the court said: "It is . . . well settled . . . that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the Court of Chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible to carry out his general charitable intent. . . . The intention of the testator is the guide."

find that the donor had two intentions, — a general charitable intent and a particular intent to have his gift take effect in a particular mode. If the latter becomes impossible of execution, the courts conclude that the donor intended to have his general intent accomplished even if changes were necessary as to the manner specifically directed. The courts frame a scheme for the execution of this general intent which conforms as closely as possible to the mode prescribed by the donor.[20] A more troublesome question is whether the courts should ever allow a departure from the particular mode of disposal on the ground of expediency. The authorities agree that the expediency of an alteration must be so pressing that unless a change is made the general charitable intent will be less efficiently executed than a reasonable donor would have wished. The fact, however, that the court can devise a better plan is not sufficient to warrant an alteration.[21] In the recent Massachusetts case of *Eliot* v. *Attwill*[22] the charitable trust had been created for the erection near Trinity Church and the care of a statue by St. Gaudens of the late Bishop Brooks. The administrators of the trust sought permission of the court to substitute a statue by Bela Pratt in place of that made by St. Gaudens on the ground that the former piece of sculpture was artistically the superior. The court rightly decided that the better satisfaction of the artistic sense did not warrant a deviation from the original trust. If the inexpediency of the specific manner of disposal must have been apparent to the donor, it seems clear that his directions should be strictly followed.[23] If, however, the inexpediency is due to a change of circumstances after

[20] *Re* Queen's School, Chester, [1910] 1 Ch. 796; Biscoe *v.* Johnson, 35 Ch. Div. 460 (1887); Ironmongers Co. *v.* Attorney-General, 10 Cl. & F. 908 (1844); Lewis *v.* Gaillard, 61 Fla. 819, 56 So. 281 (1911); Mason *v.* Bloomington Library Ass'n, 237 Ill. 442, 86 N. E. 1044 (1909); Kemmerer *v.* Kemmerer, 233 Ill. 327, 84 N. E. 256 (1908); Nichols *v.* Newark Hospital, 71 N. J. E. 130, 63 Atl. 621 (1906); Jackson *v.* Phillips, 14 All. (Mass.) 539 (1867); Read *v.* Willard Hospital, 215 Mass. 132, 102 N. E. 95 (1913); Richardson *v.* Mullery, 200 Mass. 247, 86 N. E. 319 (1908); Amory *v.* Attorney-General, 179 Mass. 89, 60 N. E. 391 (1901); Lynch, Trustee, *v.* So. Congregational Parish, 109 Me. 32, 82 Atl. 432 (1912); Women's Christian Association *v.* Kansas City, 147 Mo. 103, 48 S. W. 960 (1898).

It should be noted that formerly the doctrine of *cy-près* did not exist in New York. See Tilden *v.* Brown, 130 N. Y. 29, 45, 28 N. E. 880, 882 (1891). But by the Laws of 1901, p. 751, c. 291, it was provided that if the use becomes impracticable, the trustees may, at least twenty-five years after the gift has been given, apply to the court for instructions. For cases arising in New York since this statute, see: Sherman *v.* Richmond Hose Co. No. 2, 186 App. Div. 417, 175 N. Y. Supp. 8 (1919); Camp *v.* Presbyterian Soc., 105 Misc. 139, 173 N. Y. Supp. 581 (1918); Trustees *v.* Carmody, 158 App. Div. 738 (1913); Loch *v.* Meyer, 100 N. Y. Supp. 837 (1906).

In Wisconsin the existence of the *cy-près* doctrine seems uncertain. *Cf.* McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631 (1897), with Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345 (1900). And obviously the doctrine has no application in jurisdictions which do not allow or accept the doctrine of charitable uses. Tilden *v.* Brown, *supra.*

[21] *Re* Weir Hospital, [1910] 2 Ch. 124, 140. "But neither the Court of Chancery, nor Board of Charity Commissioners, which has been entrusted by statute, in regard to application of charitable funds . . . is entitled to substitute a different scheme for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilection which inspired his liberality, and untrammelled by his directions, would have dictated a different use of his money." See also Winthrop *v.* Attorney-General, *supra.*

[22] 122 N. E. 648 (Mass.). For a statement of the facts, see RECENT CASES, 607 *infra.*

[23] *Re* Weir Hospital, *supra*, Harvard College *v.* Attorney-General, 228 Mass. 396, 117 N. E. 903 (1917).

the donor's death, the courts should presume that he, as a reasonable man, would prefer changes whereby his general intent would be more efficiently executed to strict obedience to his directions.[24] Moreover, equity does not enforce bequests subject to freakish conditions or uses, such as a gift to a school with a provision that the descendants of certain persons should be excluded therefrom for one hundred years,[25] or a devise of a house on trust with directions that it be bricked up for twenty years.[26] In refusing to enforce these, equity prevents needless economic waste. For the same reason equity should not insist upon literal obedience to the terms of a charitable trust when, with advancement in civilization, the wisdom of the particular manner of use prescribed is denied or seriously questioned, or when the execution of the particular intent becomes economically wasteful to a considerable degree.[27]

DEDUCTION FOR BENEFITS RECEIVED BY THE PURCHASER ON RESCISSION FOR BREACH OF WARRANTY. — All courts agree that rescission will not be granted where any benefit that has been received under the contract cannot be restored.[1] The difficulty, however, lies in defining precisely what constitutes a sufficient benefit to bar rescission. In England the most nominal benefit has been held enough,[2] while the United States courts have given a less literal interpretation to the term.[3] If this rule is strictly applied to the law of sales, it may be said that in every case where title has passed the purchaser must have received some

[24] In the following *cy-près* application was allowed, although literal obedience was still possible. Attorney-General *v.* Haberdashers' Co., 3 Russ. 530 (1825); Tincher *v.* Arnold, 147 Fed. 665 (1906); Norris *v.* Loomis, 215 Mass. 344, 102 N. E. 419 (1913); Ely *v.* Attorney-General, 202 Mass. 545, 89 N. E. 166 (1909); Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414 (1899); St. James's Church *v.* Wilson, 82 N. J. Eq. 546, 89 Atl. 519 (1913); McIntire *v.* Zanesville, 17 Ohio, 352 (1848); Avery *v.* Home for Orphans, 228 Pa. 58, 77 Atl. 241 (1910); Brown *v.* Meeting Street Baptist Soc., 9 R. I. 177 (1869). In the following *cy-près* application was not allowed on account of expediency: *Re* Weir Hospital, *supra;* Harvard College *v.* Attorney-General, *supra.* And in the following the trust was held to fail for lack of a general charitable intent: *Re* Parker, [1918] 1 Ch. 437; *Re* Wilson, [1913] 1 Ch. 314; Bowden *v.* Brown, 200 Mass. 269, 86 N. E. 351 (1908); Teel *v.* Bishop of Derry, 168 Mass. 341, 47 N. E. 422 (1897); Morristown Trust Co. *v.* Morristown, 82 N. J. Eq. 521, 91 Atl. 736 (1913). If the original gift is to take effect only on a condition precedent, which is not performed, the bequest fails wholly. *Re* University of London Medical Funds, [1909] 2 Ch. 1; Cherry *v.* Mott, 1 Mylne & C. 123 (1835).

[25] Nourse *v.* Merriam, 8 Cush. (Mass.) 11 (1851).

[26] Brown *v.* Burdett, 21 Ch. Div. 667 (1882). See also 65 U. P. LAW REV. 527, 632.

[27] An interesting analogy tending to uphold a more liberal use of *cy-près* is found in the fact that equity does not enforce a restrictive covenant if circumstances have so changed from the time the covenant was made that its enforcement would injure both the dominant and servient tenements. Sayers *v.* Collyer, 28 Ch. Div. 103 (1884); Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691 (1892).

[1] WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 342, 343.

[2] In Hunt *v.* Silk, 5 East 449 (1804), where the plaintiff was not allowed to rescind for the lessor's failure to repair, Lord Ellenborough said, "if the plaintiff might occupy the premises two days beyond the time . . . and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account." Beed *v.* Blandford, 2 Y. & J. 278 (1828).

[3] Ankeny *v.* Clark, 148 U. S. 345 (1893); Campbell Printing Press Co. *v.* Marsh, 20 Colo. 22, 36 Pac. 799 (1894). See note 6, *post.*